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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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Jorge Vazquez,

Petitioner

5

vs.

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Brian Williams, et al.,

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Respondents.

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Case No. 2:14-cv-01969-JAD-PAL

Order Dismissing Petition and Closing Case

[ECF 7, 9, 13]

9   Nevada state prisoner Jorge Vazquez brings this habeas-corpus action challenging his

10   state-court convictions and resulting sentences. Because all of Vazquez's claims are

11   unexhausted, I dismiss his petition in its entirety without prejudice to his ability to file a new

12   petition after he exhausts all available state-court remedies.

13   **Background**[1]

14   On September 7, 2012, a jury in Nevada's Eighth Judicial District Court convicted

15   Vazquez of burglary (three counts), solicitation to commit murder, attempted murder, and child

16   neglect or endangerment. The trial court struck the solicitation charge, finding that it merged

17   into the attempted murder charge. The trial court then sentenced Vazquez to 28–72 months on

18   the burglary charges and consecutive terms of 96–240 months and 6–12 months (to run

19   concurrent) on the attempted murder and child neglect charges. Vazquez appealed.

20   On December 3, 2013, the Nevada Supreme Court reversed two of Vazquez's burglary

21   convictions, the attempted-murder conviction, and the child-neglect or endangerment conviction.

22   Vazquez's remaining convictions were for burglary (one count) and solicitation to commit

23   murder (one count). On remand, the trial court sentenced Vazquez to 28–72 months on the

24   burglary charge, followed by a consecutive term of 72–180 months for the solicitation charge.

25   Vazquez did not appeal.

26   On April 7, 2014, Vazquez filed a motion to modify/correct sentence in the state district

27   court. After a hearing, the court denied the motion. Vazquez appealed; the Nevada Supreme

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[1] This procedural history is derived from the exhibits filed at ECF 10–12 .

1   Court affirmed. Vazquez now seeks federal habeas relief.

2   **Discussion**

3   **A.   Claim Exhaustion**

4   A federal court will not entertain a state prisoner's federal habeas petition until the

5   petitioner has exhausted all available state-court remedies for his claims.[2] "Exhausted" means

6   that the petitioner must first give the state courts a fair opportunity to act on each of his claims

7   before he presents those claims in federal court.[3] To exhaust a claim, the petitioner must give the

8   highest available state court a fair opportunity to consider the claim through direct appeal or state

9   collateral-review proceedings.[4] This so-called "fair presentation" requirement is satisfied if the

10   claim has been presented to the highest state court by describing the operative facts and the legal

11   theory upon which the federal claim is based.[5]

12   **B.   Vazquez's petition must be dismissed because none of his claims are exhausted.**

13   In ground one, Vazquez claims that the trial court violated his due-process rights by

14   imposing a consecutive sentence of 72–180 months on the solicitation charge.   He argues that

15   this sentence is improper because the trial court had previously vacated the solicitation charge.

16   He also argues that the trial court failed to make required factual findings and to consider

17   mitigating evidence.

18   Vazquez raised this claim (and others) in his motion to modify/correct sentence,[6] but the

19   Nevada Supreme Court declined to consider this motion on the merits. The court explained that

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[2] *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b).

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[3] *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364,
23   365 (1995).

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[4] *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374,
25   376 (9th Cir. 1981).

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[5] *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir.
27   1982).

28   [6] ECF 12-6 at 4–6.

1   Vazquez's claims fell outside the "the narrow scope of claims permissible in a motion to modify

2   sentence."[7]   "Submitting a [ ]claim to the state's highest court in a procedural context [where] its

3   merits will not be considered" does not satisfy the fair-presentation requirement.[8]   Vazquez has

4   not otherwise presented this claim to the Nevada Supreme Court. Ground one is therefore

5   unexhausted, so I cannot consider it.

6   Vazquez next alleges that the trial judge erred by admitting testimony from a confidential

7   informant because the informant had previously been represented by the Clark County Public

8   Defender and the judge knew or should have known that the informant's testimony was false.

9   Vazquez has not presented this claim to the Nevada Supreme Court on direct appeal or in a

10   collateral-review proceeding. Thus, claim two is also unexhausted and therefore not yet capable

11   of federal habeas review.

12   In ground three, Vazquez alleges that he received ineffective assistance of counsel at his

13   second sentencing proceeding. Vazquez presented some of the same supporting factual

14   allegations in his motion to modify/correct sentence in state court.[9]   But, as discussed above,

15   none of the claims raised in that proceeding were fairly presented to the Nevada Supreme Court.

16   Ground three is also unexhausted because fair presentation requires the petitioner to alert the

17   state court that he asserts a claim under federal law,[10] and Vazquez failed to allege a *federal*

18   ineffective-assistance-of-counsel claim in his motion to modify/correct sentence. For both of

19   these reasons, ground three is unexhausted.

20   A federal district court must dismiss a wholly unexhausted habeas petition.[11]   Unlike with

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22   [7] ECF 12-15 at 2–3 (citing *Edwards v. State*, 918 P.2d 321, 324 (1996)).

23   [8] *See Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S.
24   346, 351 (1989)).

25   [9] ECF 12-6 at 5.

26   [10] *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan,* 513 U.S. at 365).

27   [11] *See Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (holding that a federal district
28   court must dismiss without prejudice a completely unexhausted petition).

1   "mixed petitions"—those containing both exhausted and unexhausted claims—a federal court

2   has no authority to stay a wholly unexhausted petition.[12] Because Vazquez's petition is wholly

3   unexhausted, I dismiss it without prejudice to his filing a new petition once he has properly

4   exhausted all available state-court remedies for his claims.

5   **C.**   **Certificate of Appealability**

6   Because I have rejected all of Vazquez's claims, I also consider whether he should be

7   granted a certificate of appeability. The standard for issuing of a certificate of appeability calls

8   for a "substantial showing of the denial of a constitutional right."[13] When a district court

9   dismisses a habeas petition on procedural grounds, the petitioner must show that "jurists of

10   reason would find it debatable whether the petition states a valid claim of the denial of a

11   constitutional right and that jurists of reason would find it debatable whether the district court

12   was correct in its procedural ruling."[14] Having reviewed Vazquez's claims under this standard, I

13   find that he has not made the requisite showing, and I decline to issue him a certificate of

14   appealability on any of his claims.

15   <div align="center">**Conclusion**</div>

16   Accordingly, with good cause appearing and no reason to delay, IT IS HEREBY

17   ORDERED, ADJUDGED, AND DECREED that respondents' motion to dismiss **[ECF 9]** is

18   **GRANTED.** This action is **DISMISSED** without prejudice, and a certificate of appealability is

19   **DENIED.**

20   IT IS FURTHER ORDERED that respondents' motion to seal exhibit **[ECF No. 13]** is

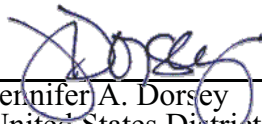21   **GRANTED** *nunc pro tunc* to August 10, 2015.

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24   [12] *See Rhines v. Weber*, 544 U.S. 269 (authorizing stay and abeyance of a mixed federal habeas
petition); *see also Raspberry*, 448 F.3d at 1154 (declining to extend the *Rhines* stay and abeyance

25   procedure to wholly unexhausted petitions).

26   [13] 28 U.S.C. § 2553(c).

27   [14] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074,

28   1077–79 (9th Cir. 2000).

1   The Clerk of the Court is instructed to **CLOSE THIS CASE.**

2   Dated this 3rd day of February, 2016.

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    Jennifer A. Dorsey

5   United States District Judge

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